FOR ARGUMENT

No. 87-107

In the Supreme Court of the

United States.

October Term 1987

Brenda Patterson. Petitioner

v.

McLean Credit Union. Respondent

On Writ of Certiorari to the

United States Court of Appeals

For the Fourth Circuit

Brief Pro Se of J. Philip Anderegg.

a Member of the Bar of the

Supreme Court of the United

States. as Amicus Curiae

Supporting Respondent

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QUESTION PRESENTED

This brief for J. Philip Anderegg as amicus curiae deals only with the question that the Court in its order of April 25, 1988, asked the parties to address on reargument: Whether the interpretation of 42 U.S.C. § 1981 adopted by this Court in Runyon v. McCrary, 427 U.S. 160 (1976), should be reconsidered.

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BRIEF OF J. PHILIP ANDEREGG AS AMICUS CURIAE SUPPORTING RESPONDENT

This brief is submitted, on the written consent of the parties, on behalf of J. Philip Anderegg, a member of the Bar of this Court, appearing pro se, as amicus curiae in support of the respondent. Letters of consent from the parties have been lodged with the clerk.

INTEREST OF AMICUS CURIAE

The interest of J. Philip Anderegg is that of a lawyer, a member of the Bar of this Court, desirous of seeing clarity, simplicity, and knowability in the law.

SUMMARY OF ARGUMENT

Runyon v. McCrary, 427 U.S. 160 (1976), holding 42 U.S.C. § 1981 to prohibit private acts of discrimination in the making of contracts, was wrongly decided and should be reconsidered because:

1) the language and plain meaning of § 1981 do not support that holding;

2) the legislative history of that section, while showing a desire on the part of many members of the 39th Congress which enacted /the Civil Rights Act of 1866 to provide a Federal remedy for tortious and criminal private acts by whites against

newly emancipated blacks in the immediate post-Civil War period, does not show significant support for compelling whites, or anyone else, to make (i.e. to enter into) contracts with other persons, of whatever race, even when the reluctance or refusal on the part of one party to a proposed contract was based on racial animosity toward the other party to the proposed contract;

3) if Runyon was rightly decided, then § 1981 should prohibit acts of private discrimination against aliens on the ground of their alienage. Such a result would be not only unjustified by the language and history § 1981; it would be in clear conflict with § 274B(a) of the Immigration and Nationality Act (8 U.S.C. § 1324b(a)) as added by § 102 of the Immigration Reform and Control Act of 1986, P.L. 99-603;

4) Runyon, if maintained, will leave us with an undesirable (or worse) future case-by-case determination of the separation of "the type of contract offer within the reach" of § 1981 from the type without" (Justice Powell, concurring, in Runyon at 427 U.S. 188).

ARGUMENT

I. THE PLAIN LANGUAGE OF § 1981 DOES NOT SUPPORT RUNYON.

That "the same right ... to make ... contracts ... as is enjoyed by white citizens" conferred by § 1981 on "[a]ll persons within the jurisdiction of the United States" cannot include a right in A to compel B to make a contract with A, no matter what the basis of B's unwillingness, because white citizens did not "enjoy" such a right at the time of enactment of either the Civil Rights Act of 1866 or the Voting Rights Act of 1870.

has been set forth in the dissent of Justice White in Runyon and in Bhandari v. First National Bank of Commerce, 808 F.2d 1082 (5 Cir. 1987, hereinafter "Bhandari I") at 808 F.2d 1092-93 better than I can. Hence I will not weary the Court with further words on the subject.

II. THE LEGISLATIVE HISTORY OF § 1981 DOES NOT SUPPORT RUNYON.

As part of its argument directed to the legislative history of § 1981, Petitioner's Brief on Reargument argues at length (pp. 14 to 54) that the 39th Congress intended section 1 of the Civil Rights Act of 1866 to bar all racial discrimination, private as well as state-action-based. As to private discrimination that brief sets forth material presented to Congress concerning torts and crimes committed by whites against blacks in the South after the emancipation

of the slaves. It also sets forth material concerning the imposition by whites of overreaching, abusive terms in the contracts of employment which whites made with former slaves, and breaches by whites of those contracts, e.g. refusals to pay wages due. The understandable angry reaction of members of Congress to this material is also set forth.

By far most of this material pertains however, in the terms of Rhandari I, to what Rhandari I calls the third (and "best") of this Court's arguments in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) to support the proposition that § 1 of the 1866 Civil Rights Act reaches private discrimination. See 808 F.2d at 1092 and 1094-95. But as Rhandari I notes (808 F.2d at 1095), the congressional desire aroused by evidence of private injustices

against blacks was a desire "to eradicate racist practices beyond those the language of the statute [the Civil Rights Act of 1866] appears to reach." That Congress knew of, and was angered by, torts, crimes and breaches of contract committed by whites against blacks does not justify expanding § 1981 to cover racially motivated refusals to make contracts.

As Bhandari I explains (808 F.2d at 1095), the history of the 1870 Act

> is completely different. It leaves no doubt that Congress was concerned with legal discriminations against aliens by the states alone.

The 5th Circuit's reasons for so saying are set out at 808 F.2d 1095-97, and its views to the same effect are set out in even greater detail in its subsequent en banc decision of the same name dated October 5, 1987 (hereinafter "Bhandari II") reported at 829 F.2d 1343. See 829 F.2d

at 1345-48.

In Bhandari II, the full bench of the 5th Circuit overruled the earlier 5th Circuit decision of Guerra v. Manchester Terminal Corp., 498 F.2d 641 (1974) which had held that §1981 does forbid private discrimination based on alienage. A Petition for Certiorari, No. 87-1293, was filed in this Court on 2/2/88 for review of Bhandari II.

III. PUNYON IMPOSES ON § 1981 A CONFLICT WITH THE RIGHTS OF ALIENS UNDER THE IMMIGRATION AND NATIONALITY ACT UNLESS, INCONGRUously, that section is held to FORBID ONLY STATE-ACTION-BASED DISCRIMINATION AGAINST ALIENS, NOTWITHSTANDING ITS PROHIBITION, UNDER PUNYON, OF PRIVATE ACTS OF DISCRIMINATION AGAINST CITIZENS.

Justice White's dissent in Punyon

points out the "logical impossibility" (427 U.S. at 206) of holding, as Runyon does, that U.S. citizens are protected by § 1981 against private acts of discrimination whereas aliens are (be supposed to be beyond discussion) protected by the same language only against state-action-based discrimination. Absent action by Congress, not to be counted on, and if Runyon is left undisturbed, either our law (judge-made) will accept this logical impossibility (to the discredit of the law, I submit), or it will, in the teeth of the historical evidence as to the 1870 Civil Rights Act detailed in the Bhandari opinions , hold that aliens like citizens are protected by § 1981 against private acts of discrimination.

This latter is an equally undesirable, indeed a wholly unacceptable outcome. Under section 274B(a) of the Immigration

Act, 8 U.S.C. § 1324b(a)) added by § 102 of P.L. 99-603, the Immigration Reform and Control Act of 1986, it is an "unfair immogration-related employment practice" to discriminate against an alien on the ground of his alienage ("citizenship status"), but only if the alien is lawfully admitted, is admitted as a refugee, or is granted asylum, and in any of those cases has completed a declaration of intention to become a citizen -- and has followed up that declaration within time limits and with results not necessary to be set out here. Moreover, under that same section 274B(a) an employer may systematically prefer a citizen over an alien if the two are equally qualified.

I think it fair to call a conflict a situation wherein one law prohibits conduct which another law, by careful choice of languagedoes not, and that is the situat-

ion here.

The way to avoid both horns of the dilemma is to overrule Runyon and bring § 1981 back to a prohibition of discrimination by state action only.

IV. RUNYON SHOULD BE RECONSIDERED, AND OVERRULED, BECAUSE IT CANNOT BE APPLIED TO ALL CONTRACTS, AND BECAUSE THE "CASE-BY-CASE" METHOD OF DETERMINING THE LIMITS OF THE RUNYON RULE LEAVES THE PUBLIC IN IGNORANCE UNTIL THE JUDICIARY IS LED BY THE ACCIDENTS OF LITIGATION TO SPEAK. THIS IS NOT A SYSTEM OF LAW FOR A FREE PEOPLE.

Concurring in Runyon, in important part because he thought the case did not involve a personal contractual relationship such as one in which the offeror selects those with whom he desires to bargain on an individualized basis, Justice Powell conceded (427 U.S. at 187-89) that

some offers to contract should be outside the reach of Runyon. He also recognized that it might be (and I submit that it clearly is) impossible to draw a "bright line" easily separating the type of contract offer within the reach of § 1981 (given the Runyon decision, he surely meant) from the type without, i.e. outside it. Justice White expressed similar, and more acute misgivings in his dissent (427 U.S. at 212). I make bold to urge upon the Court that certainty, clarity and knowability of rules of law are a high value, for a free people, and that they are set at an undesirable discount by Runyon.

CONCLUSION

I leave to the parties other issues. With respect however to the issue of stare decisis, I urge the following: Runyon is an example of the use of legislative history to make a statute mean something

which it does not say. As such I submit that it is wrong. And it is only one example of a growing, and I think pernicious, tendencyin American law. The Court ought to correct this error by overruling Runyon. If Congress wants to make more private acts of discrimination illegal than it has so far, e.g. in the Civil Rights Acts of 1964 and 1968, and if it has the power under the Constituion to do so, then that is Congress'prerogative to do. And it would help our country if Congress learned that precision in the drafting of statutes is vital, and that courts will not fill out lacunae in statutes by combing through legislative reports and debates.

Respectfully submitted,

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